

# AN OVERVIEW OF FEDERAL MILK MARKETING ORDERS

*Lois Bonsal Osler\**

## INTRODUCTION

Although the Agricultural Marketing Agreement Act of 1937 (AMAA)<sup>1</sup> may strike many as an anticompetitive relic of the New Deal era, this statute provides the framework for the marketing of the majority of dairy products sold in the United States.<sup>2</sup> As the Supreme Court has observed: “[T]he economy of the [milk] industry is so eccentric that economic controls have been found at once necessary and difficult. These have evolved detailed, intricate and comprehensive regulations, including price-fixing.”<sup>3</sup>

This article offers a general overview of the basic structure of the federal milk marketing system.

## I. PURPOSE OF THE ACT

In the early 1900's, the imbalance in the market power of milk producers and milk distributors, as well as the perishable nature of milk, created a dysfunctional supply and demand and pricing environment.<sup>4</sup> These unstable marketing conditions endangered the availability of adequate supplies of pure Grade A milk. Explaining the purpose of the AMAA, Congress stated that it wished to correct this market anomaly: “In the case of fluid-milk markets, the problem of producers is largely one of securing price stability, uniformity of purchase methods, and eq-

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\* J.D., University of Virginia School of Law, 1984. Ms. Osler is a trial attorney with the United States Department of Justice.

The views expressed in this article are those of the author and do not necessarily reflect the views of the United States Department of Justice.

<sup>1</sup> 7 U.S.C. §§ 601-659 (1992).

<sup>2</sup> See generally 7 C.F.R. §§ 1001-1139 (1992).

<sup>3</sup> *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 529 (1949); see also *Nebbia v. New York*, 291 U.S. 502, 517-518, 521-522 (1934).

<sup>4</sup> AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., THE FEDERAL MILK MARKETING ORDER PROGRAM (Mktg. Bull. No. 27, Jan. 1989).

uitable methods of sharing the burdens of market surpluses.”<sup>5</sup>

## II. THE PROCESS OF REGULATION

In the AMAA, Congress empowered the Secretary of the United States Department of Agriculture (USDA) to adopt the regulations governing the handling and pricing of milk.<sup>6</sup> While the goals and aspirations underlying the AMAA are relatively clear, the process of regulation is remarkably complicated. As one appellate court judge lamented: “The ‘milk program’ is exquisitely complicated . . . . The milk problem is so vast that fully to comprehend it would require an almost universal knowledge ranging from geology, biology, chemistry and medicine to the niceties of the legislative, judicial and administrative processes of government.”<sup>7</sup>

Notwithstanding these dire descriptions, federal milk regulation may be perhaps most easily understood by remembering one principle: all federally regulated Grade A milk is treated equally. Regardless of whether it becomes the finest cream or the lowliest milk powder, the AMAA provides that the dairy farmer will receive the same minimum price for the farmer’s milk.<sup>8</sup>

Specifically, the AMAA provides that marketing orders covering milk and various products incorporating milk must address, *inter alia*, classification of milk based on its uses, minimum prices for each classification, and methods for determining a uniform or “blend” price paid to producers for milk delivered to handlers regulated under the order regardless of the ultimate usage, or classification, of the milk.<sup>9</sup> With respect to classification, milk is classified as Class I if it is used as fluid milk, such as beverage milk; as Class II if it is used as a “soft” dairy product, such as yogurt, ice cream and cottage cheese; and as Class III if it is used for “hard” manufactured dairy products, such as cheese,

<sup>5</sup> S. REP. NO. 1719, 76th Cong., 3d Sess. 4 (May 29, 1940).

<sup>6</sup> 7 U.S.C. § 602 (1992) (setting forth declaration of policy).

<sup>7</sup> *Queensboro Farms Products, Inc. v. Wickard*, 137 F.2d 969, 974-75 (2d Cir. 1943). See also *Zuber v. Allen*, 396 U.S. 168, 172-87 (1969) (describing the “labyrinth of the federal milk marketing regulation”); *Suntex Dairy v. Block*, 666 F.2d 158, 166 (5th Cir., 1982), *cert. denied*, 459 U.S. 826 (1982) (noting the “Byzantine nature of milk marketing regulation”).

<sup>8</sup> It should be noted that dairy farmers can receive prices above the minimum order price through over-order pricing and other arrangements. Over-order pricing is a premium price paid above the minimum price prescribed by applicable regulations. Exploration of these matters is, however, beyond the scope of this overview.

<sup>9</sup> 7 U.S.C. § 608c(5) (1992).

butter or nonfat dry milk.<sup>10</sup>

### III. DETERMINATION OF PRICE TO FARMER

Each class of milk commands a different, but related, price. These prices are a combination of a changing “mover” price and a fixed differential, or add-on, price. The “mover” of all three classes’ prices is the unregulated price paid for Grade B milk by purchasers in Minnesota and Wisconsin, popularly known as the “M-W price.” Grade B milk only can be used to produce “hard” dairy products. Accordingly, the price of Grade B milk, and thus the M-W price, fluctuates based on market demand. The federal milk orders incorporate this market price by requiring that Class III Grade A milk be priced at the M-W price level. The Class II price is set at the Class III price (i.e., the M-W price) plus a fixed amount. Finally, Class I products command the Class III price plus a fixed Class I differential. The differential varies generally in proportion to the distance between the geographical areas covered by each marketing order and is intended to attract surplus milk to areas without adequate supplies of milk.<sup>11</sup> Thus, milk used for Class I products bears the highest minimum price, and the regulated minimum price for Class II milk is higher than that of Class III milk.

Classification and classified pricing are not, however, determinative of the minimum price for milk received by dairy farmers. Indeed, even if a dairy farmer’s entire output is used for Class I milk, the farmer does not receive the Class I price. Instead, § 608c(5)(A)<sup>12</sup> provides that all handlers in a given order must pay producers a uniform minimum “blended” price based on utilization (i.e., Class I, II or III) for milk “pooled” in that order:

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and . . . no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay . . . Such prices shall be uniform as to all handlers . . . .<sup>13</sup>

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<sup>10</sup> Milk in the New England and Other Marketing Areas, Decision on Proposed Amendments to Tentative Marketing Agreements and Orders, 58 Fed. Reg. 12,634-35 (Mar. 5, 1993).

<sup>11</sup> Milk in the New England and Other Marketing Areas, Amplified Decision, 59 Fed. Reg. 42,422-25 (Aug. 17, 1994).

<sup>12</sup> 7 U.S.C. § 608c(5)(A) (1992).

<sup>13</sup> *Id.*

Similarly, the "blend" provisions contained in § 608c(5)(B) direct that producers receive the same price for their milk:

the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them . . . ; or . . . the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered . . . .<sup>14</sup>

Thus, through these statutory provisions, Congress has mandated that producers pooling their milk within each different marketing order, i.e., intra-order, receive a uniform blended price based on the total utilization of all variously priced milk pooled in that specific order. Thus, this provision establishes that within each marketing order all producers shall receive a uniform price—the blend price for all milk pooled in that order—regardless of the utilization of any given producer's milk.

#### IV. THE BLEND PRICE

The "blend" price serves an important policy interest in ensuring that adequate supplies of milk will be available to satisfy fluctuating demand. As the USDA has recognized, sufficient milk supplies must be available both to satisfy Class I demand and to provide a sufficient reserve of milk in excess of that demand which can, if market conditions require, be diverted to Class I use.<sup>15</sup> Since reserve milk is not, by definition, Class I or fluid milk, dairy farmers producing reserve milk in a regulated environment receive a lower price than that commanded by fluid milk, and accordingly could be disinclined to provide sufficient reserve milk. Due to blend pricing, however, dairy farmers have the necessary incentive to produce adequate milk supplies by sharing the high prices received for Class I milk as well as the lower prices paid for Class II and Class III products. Recognizing this principle the Supreme Court noted: "A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milkshed."<sup>16</sup>

Although Class I prices were developed through numerous administrative proceedings, in 1985 Congress reexamined the milk pricing pro-

<sup>14</sup> *Id.* at § 608c(5)(B)(ii).

<sup>15</sup> See *supra* note 10, at 12,647 (discussing appropriate level of reserve milk).

<sup>16</sup> *Nebbia v. New York*, 291 U.S. 502, 517-18 (1934); see also *Zuber v. Allen*, 396 U.S. 168, 179 (1969) ("The foundation of the [AMAA] is to provide uniform prices to all producers in the marketing area.").

gram and mandated the current Class I milk differentials.<sup>17</sup> The 1985 Act affected price differentials only, and did not alter the overall pricing structure for Class I milk.<sup>18</sup> Congress adopted the 1985 Act after conducting extensive hearings concerning dairy and other agricultural products. For example, Congress received testimony from numerous dairy industry sources,<sup>19</sup> and examined such matters as increased transportation, assembly and handling costs,<sup>20</sup> the declining cost of feed for dairy cows,<sup>21</sup> the problem of milk surpluses and deficits in some areas,<sup>22</sup> the desirability of setting Class I differentials at a level that would attract surplus milk to deficit markets,<sup>23</sup> and handler procurement of milk from outside traditional supply areas.<sup>24</sup> Based on its review of market conditions, Congress increased Class I differentials to "more fully address the cost of transferring milk from the surplus areas to the deficit areas."<sup>25</sup> The differentials prescribed by Congress remain in effect today.<sup>26</sup>

#### CONCLUSION

The federal milk marketing system serves to insure that adequate supplies of fluid milk are available throughout the geographical areas covered by the system. It is a complex system, with a multitude of nuances affected by many pressures. As the economy of the milk industry evolves, Congress may, as it did in 1985, choose to revise the regulatory system. In view of its longevity, however, the system may be in place in some form until, so to speak, the cows come home.

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<sup>17</sup> See Food Security Act of 1985, Pub. L. No. 99-198, § 1, 99 Stat. 1354 (1985).

<sup>18</sup> See 7 U.S.C. § 608c(5)(A) (1992).

<sup>19</sup> These sources included representatives of dairy producers from the Upper Midwest. See H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1, at 354-58 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1458-62 (listing witnesses testifying before Congressional subcommittee responsible for drafting dairy provisions of 1985 Act).

<sup>20</sup> H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1, at 22, 24 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1126, 1128.

<sup>21</sup> H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1, at 18 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1122.

<sup>22</sup> H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1, at 23 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1127.

<sup>23</sup> H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1, at 23-24 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1127-28.

<sup>24</sup> *Id.*

<sup>25</sup> See *supra* note 22.

<sup>26</sup> See 58 Fed. Reg. at 12,646 (1993). The differentials are, however, the subject of ongoing litigation; see *Minnesota Milk Producers Ass'n v. Espy*, Civ. App. No. 4-90-31 (D. Minn. filed Jan. 17, 1990) (the author is counsel for defendants).